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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF WYOMING,
Plaintiff,
v.
STATE OF OKLAHOMA,
Defendant.

MOTION OF WYOMING MINING ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF MOTION OF STATE OF WYOMING FOR LEAVE TO FILE COMPLAINT

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Pursuant to Rule 36.1, the Wyoming Mining Association ("Association") respectfully requests the Court's consent to file the accompanying brief as *amicus curiae* in support of Plaintiff, the State of Wyoming. The attorney for the State of Wyoming has consented to the filing of the accompanying brief of the Association.[1] The attorney for the Defendant, the State of Oklahoma, refused to grant consent.

The State of Wyoming has challenged an Oklahoma statute requiring that at least ten percent of the coal burned by Oklahoma electric utilities be coal produced in Oklahoma. The Association includes Wyoming coal mining companies that had provided the full requirements of coal used by Oklahoma utilities prior to the local content initiative. As the major suppliers of coal to Oklahoma, and as suppliers to other states which might be influenced to enact similar legislation, the Association's members have an interest in the Court determining

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[1] The statement of consent of Counsel for the State of Wyoming has been filed with the Clerk of the Court.

whether Oklahoma's protectionist legislation is an unconstitutional interference with interstate commerce.

The State of Wyoming has challenged the Oklahoma statute on grounds that the law is an unconstitutional interference with interstate commerce. As an association of coal producers whose market has been intentionally diverted to Oklahoma coal producers by the State of Oklahoma for blatantly economic protectionist purposes, the Association can demonstrate the effects of the Oklahoma action on interstate commerce. In addition to the impact on the State of Wyoming of lost severance tax revenues,[2] the adverse economic effects of the Oklahoma statute are borne by Wyoming coal producers.

While the Complaint of the State of Wyoming rests on Commerce Clause arguments, the Association believes the Court also should consider other broad national concerns, such as national environmental policy, raised by the Oklahoma statute.

Respectfully submitted,

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June 13, 1988

[2] The Association notes that the State of Wyoming is also likely to lose revenues from shared royalties from the large number of federal leases involved in Wyoming coal production.

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BRIEF OF AMICUS CURIAE WYOMING MINING ASSOCIATION IN SUPPORT OF MOTION OF STATE OF WYOMING FOR LEAVE TO FILE COMPLAINT

INTEREST OF THE AMICUS CURIAE

In 1986 the State of Oklahoma enacted a law, effective January 1, 1987, requiring that at least ten percent of the coal burned by Oklahoma electric utilities be coal mined in Oklahoma.[1] The Oklahoma law, which is at issue in the Complaint of the State of Wyoming, interferes with existing sales and presents a barrier to future sales between Wyoming coal producers and Oklahoma utilities. The Wyoming Mining Association ("Association") is composed of companies which produce coal in Wyoming, and includes companies which sell coal to Oklahoma utilities. The law thus imposes economic injury on members of the Wyoming Mining Association, who previously had furnished virtually all of the coal used in the boilers of Oklahoma electric utilities and whose sales

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[1] OKLA. STAT. tit. 45 § 939 (Supp. 1986).

to those utilities have declined by approximately 12 percent.

The Association's members fear that, if the law is not invalidated swiftly and definitively by the Court, similar initiatives in other states will be enacted, erecting market barriers to coal across the nation as coal-producing states attempt to protect domestic coal production and sales. Furthermore, protectionist measures patterned after the Oklahoma coal industry precedent may be extended to other industries, obstructing market access to an unlimited variety of commodities.

Because of the existing and future deleterious effects of the Oklahoma protectionist statute on Wyoming coal producers, the Association supports the Motion of the State of Wyoming for Leave to File Complaint. Moreover, because of the national scope of the economic injury and interference with free flow of commerce that may result if this statute is not invalidated, and the direct conflict with national air quality policy posed by the statute, the Association urges the Court to recognize the national ramifications of Oklahoma's action and accept jurisdiction.

SUMMARY OF ARGUMENT

The Oklahoma statute challenged by the State of Wyoming erects an absolute barrier to a segment of the Oklahoma coal market that has historically been served by Wyoming coal producers. As a result it has imposed a significant burden on commerce between the two states to the benefit of Oklahoma coal producers and to the detriment of the State of Wyoming, including its coal producers. The effects of the Oklahoma protectionist measure, if allowed to stand, are national in scope, posing the threat of "me too" legislation by other states with other commodities, that will impede the free flow of commerce between the states. Aside from impermissibly interfering with interstate commerce, the Oklahoma stat-

ute also threatens the integrity of important national environmental policy.

The scope and significance of the impacts, both real and potential, of the Oklahoma statute compel a decisive and expeditious response that only the Court, by asserting its original jurisdiction, can provide.

ARGUMENT

There is no question that Oklahoma's statute constitutes facially discriminatory economic protectionism—a form of interference with interstate commerce that is prohibited *per se*. The brief of the State of Wyoming presents the constitutional question and addresses the Court's original and exclusive jurisdiction without need for amplification by the Association. The Association concurs with and supports Wyoming's brief on these matters. The Association seeks to address the Court to emphasize that this case presents a claim of the appropriate "seriousness and dignity" [2] to warrant the critical scrutiny of the Court.

I. THE BURDEN ON INTERSTATE COMMERCE IMPOSED BY THE OKLAHOMA STATUTE IS SIGNIFICANT AND REAL

The nature, intent and actual effect of the Oklahoma statute is discrimination for economic purposes in favor of Oklahoma coal producers and against Wyoming coal producers. The statutory mandate for Oklahoma electric utilities to burn a mixture containing at least ten percent Oklahoma coal was the culmination of legislative efforts dating from 1985 to reduce coal purchases specifically from Wyoming.[3] Prior to the local content initiatives,

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[2] *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

[3] *See* Brief of State of Wyoming in Support of Motion for Leave to File Complaint, Appendix at A-11, A-12. The 1986 statute may not be the final word by Oklahoma on the matter, however. *See*

Wyoming coal satisfied 100 percent of the coal requirements of Oklahoma electric utilities.[4] Therefore, the impact of the ten percent reduction in the Oklahoma electric utility market will be borne almost exclusively by Wyoming and its coal producers.

Compliance by Oklahoma utilities with the ten percent requirement has resulted in a 12 percent decline in sales to Oklahoma utilities by Wyoming coal producers since 1985, representing lost sales amounting to approximately 1.5 million tons of coal, compared to the 1985 Oklahoma sales. Rather than serving 100 percent of the Oklahoma utility market, Wyoming sales to Oklahoma utilities decreased to 90 percent in 1987. While a ten percent loss of market share in one market is itself dramatic and economically critical, the extent of the injury is compounded by the fact that Oklahoma represents a large proportion of the total market for Wyoming coal sales. Exports to other states represent more than 84 percent of Wyoming coal sales. Prior to the Oklahoma domestic coal content requirement, Oklahoma was Wyoming's fourth largest export coal customer, representing approximately 11 percent of the export market for Wyoming coal.

The result of the ten percent mandate is that ten percent of the pre-1986 Oklahoma market for Wyoming coal has been directly and deliberately shut off and has now become a captive market for Oklahoma coal producers. This intended result occurs despite the higher

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Oklahoma Senate Concurrent Resolution No. 45, 1st Session (1987), appended, finding that the ten percent requirement has been an effective economic development initiative, and seeking to develop additional markets for Oklahoma coal, including reviewing the ten percent requirement.

[4] Data regarding Wyoming coal sales to Oklahoma utilities was derived from Department of Energy/Energy Information Administration *Coal Distribution Report*, EIA Publication No. 0125, for years 1984-87.

cost[5] and inferior environmental characteristics[6] of Oklahoma coal compared to Wyoming coal.

The effect on sales of Wyoming coal to Oklahoma demonstrates that the Oklahoma statute erects a barrier to the free flow of commerce between Oklahoma and Wyoming. Such blatant parochial favoritism is the essence of state economic protectionism that is anathema to the federal system of government. The authors of the Constitution sought to preclude precisely this result by providing for the regulation of interstate commerce exclusively by Congress. The Court has consistently struck down such parochial initiatives.

II. THE POTENTIAL BURDEN ON INTERSTATE COMMERCE IF THE OKLAHOMA STATUTE IS ALLOWED TO STAND IS NATIONAL IN SCOPE

While the interference with interstate commerce between Oklahoma and Wyoming caused by the Oklahoma statute is obvious, the potential implications if the statute is allowed to stand are national in scope. For this reason alone, it is critical that the Court accept jurisdiction and move decisively to stifle the very real nationwide threat to interstate commerce posed by such discriminatory parochial initiatives.

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[5] The ten percent requirement is not applicable if it would have certain cost consequences to the consumer or to the utility. OKLA. STAT. tit. 45 § 939.1 (Supp. 1986). The meaning of this limitation is controversial. At least one Oklahoma utility is interpreting it to require only that the delivered price of the Oklahoma coal not exceed the cost of Wyoming coal by more than five percent. Thus, the total additional cost, including the higher price and the extra costs of burning and controlling pollution emissions from Oklahoma coal, is not considered. *See* "AMAX Nears GRDA Award; Dispute Lingers Over 'Buy Oklahoma' Law Interpretation," *Coal Week*, Vol. 14, No. 19 (May 9, 1988); "Grand River Dam Coal Purchasing Policy Straddles Conflicting Oklahoma Laws," *Id.*, Vol. 14, No. 20 (May 16, 1988).

[6] *See* n.11, *infra*.

The brief of the State of Wyoming noted that local coal legislation is being considered in some form by at least two other states, Kansas and Missouri. The Association understands that other states, including Alabama, Arkansas, and Louisiana, have also enacted or are considering similar legislation.[7] If Oklahoma's law stands, these states and others are likely to look more seriously at such initiatives, posing the likelihood that similar statutes will proliferate among those coal-producing states that are net coal importers. The possibility raises the spectre of coal-producing states that are net importers lining up against their coal-producing-state suppliers, and the inevitable retaliatory measures that will ensue. Such reasonably foreseeable effects would impose a series of bars to the movement of coal in interstate commerce,[8] obstructing the benefits of free trade among the states.

A balkanization in coal trade may well develop if protectionist legislation such as Oklahoma's is allowed to stand. This effect is likely because of the quality characteristics of coal that make coal mined in one area of the country more desirable for a certain purpose than coal mined in another area. For example, Wyoming coal has low sulfur content, a desirable characteristic for utilities and other industrial coal-fired boiler users attempting to meet state and federal sulfur dioxide emission limitations. States in producing areas where the characteristics of the coal make it less marketable may follow Oklahoma's lead if this statute is not invalidated. The effect could

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[7] A 1983 Alabama statute requires coal-fired cogenerators in the state to purchase only coal produced in Alabama. ALA. CODE § 37-12-5 (1986 Supp.). A 1987 Arkansas statute imposed local content requirements on Arkansas electric utilities similar to those of Oklahoma. General Acts of Arkansas, 1987 Arkansas Act 553 (1987).

[8] The current interstate commerce in coal is substantial. Out-of-state shipments of coal by the 20 coal-exporting states represented 56 percent of total electric utility coal in 1986. National Coal Association, *Steam Electric Plant Factors* (1987), at I-10 - I-13.

be that market access to entire regions of the country is restricted or closed to coal producers in other regions.

Furthermore, if a ten percent local content requirement is allowed to stand, states will be tempted to enact even more stringent requirements, mandating 50 percent or even total local content.[9] And if a local coal content statute is allowed to stand, what is to preclude states that are net importers of other locally-produced resources or commodities from protecting local industry by mandating local content? Such possibilities are logical outgrowths of the Oklahoma action, and yet they completely eviscerate the bar against state regulation of interstate commerce.

III. THE OKLAHOMA STATUTE CONFLICTS WITH IMPORTANT NATIONAL POLICY

In addition to the Commerce Clause issue, this case presents a policy question of national importance. The Oklahoma action severely constrains the ability of Oklahoma utilities, as sources of air pollution, to maintain and improve air quality. This result directly conflicts with the nation's goal "to protect and enhance the quality of the nation's air resources." [10]

Oklahoma coal is higher in sulfur content than the very low sulfur coal produced in Wyoming. It is likely that a major reason Oklahoma utilities purchase Wyoming coal is its low sulfur content, which allows emission sources to meet sulfur dioxide emission limitations with little or no additional abatement measures.[11] By

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[9] *See, e.g.*, the Alabama statute discussed above at n.7. The Association understands consideration has been given in Oklahoma to introduction of legislation raising the ten percent minimum local content requirement to 15 percent. *See also* n.3.

[10] Clean Air Act, Section 101, 42 U.S.C. § 7401.

[11] The annual average sulfur dioxide emission rate of Wyoming coal is 0.92 pounds of sulfur dioxide per million British thermal

restricting its utilities' ability to meet air quality limitations by using low sulfur coal, the State of Oklahoma is either imposing on the utilities the cost of the additional pollution control equipment necessary to achieve an equal level of emissions,[12] or is requiring them to forego the additional increment of sulfur dioxide abatement they were able to achieve before with almost exclusive use of Wyoming coal.

The vehicle chosen by the State of Oklahoma to protect its coal industry is therefore not only an impermissible burden on interstate commerce, but also thwarts an important federal policy to protect and enhance the Nation's air.

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units ("Btu"), compared to 4.63 pounds of sulfur dioxide per million Btu of Oklahoma coal. *See* National Coal Association, *Steam Electric Plant Factors* (1987), at I-12, 13.

[12] A separate, but related, consideration is the impact on utility operations and equipment integrity of mandating the burning of coal of a type the boilers and other equipment were not designed to burn. Boilers are frequently designed to specifications tailored to characteristics of coal from specific mines. Burning coal from other mines may result in less efficient burning and may lead to equipment malfunction and increased maintenance costs.

CONCLUSION

The broad national implications, the significant barrier to interstate commerce, and the substantial threat to federalism posed by the Oklahoma statute provide compelling bases for the Court to grant the motion of the State of Wyoming for leave to hear its complaint.

Respectfully submitted,

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June 13, 1988

APPENDIX

STATE OF OKLAHOMA

1st Session of the 41st Legislature (1987)

SENATE CONCURRENT
RESOLUTION NO. 45

BY: STIPE of the SENATE

and

GLOVER and BARKER
of the HOUSE

AS INTRODUCED

A CONCURRENT RESOLUTION STATING LEGISLATIVE INTENT ON INTERIM STUDY CONCERNING THE MARKETING OF OKLAHOMA COAL; ADVISING SAID COMMITTEE TO STUDY CURRENT LAW; MAKING A PERMANENT RECORD; AND DIRECTING DISTRIBUTION.

WHEREAS, the 1986 law, mandating electric utilities with coal-fired generating plants to burn at least ten percent Oklahoma coal (Sections 939 and 939.1 of Title 45 of the Oklahoma Statutes) has been an economic development success story resulting in jobs vital to the State of Oklahoma; and

WHEREAS, the further sale of more Oklahoma coal will result in even greater economic benefits; and

WHEREAS, the development of new markets for Oklahoma coal such as those provided by the 1986 "10 percent burn" law is indicative of economic diversification; and

WHEREAS, developing other markets for Oklahoma coal outside the state boundaries will create even more jobs and economic fruits for the State of Oklahoma.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE 1ST SESSION OF THE 41ST OKLAHOMA LEGISLATURE, THE HOUSE OF REPRESENTATIVES CONCURRING THEREIN:

THAT a joint committee be created of the House of Representatives and the Senate to undertake an interim study to learn more about assisting the development of new markets for Oklahoma coal.

THAT said interim study also include a review of the 1986 "10 percent burn" law.

THAT a copy of this resolution be spread upon the pages of the permanent journal of the Oklahoma State Senate and the Oklahoma House of Representatives of the 1st Session of the 41st Oklahoma Legislature.

THAT a copy of this resolution be distributed to the Governor and the Lieutenant Governor.

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